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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

TO: The Commission

MOTION FOR STAY

Daniels Cablevision, Inc. ("Daniels"), a cable television operator in California serving approximately 50,000 subscribers, hereby moves that the Commission stay the effect of those regulations adopted by its Report and Order, FCC 93-117, released May 3, 1993 in the captioned proceeding (hereinafter "R&O"). The subject regulations, if implemented, will directly and adversely affect Daniels' cable television operations. It is requested that the stay be made applicable to all of those regulations scheduled to become effective June 21, 1993 and, at minimum, remain in force until 30 days after the Commission issues a final order in response to the Notice of Proposed Rulemaking on cost-of-service standards.

Daniels supports the "Petition for Stay", filed June 4, 1993 on behalf of InterMedia Partners, L.P. and adopts the arguments made therein. It is submitted that the grounds for stay relied upon by InterMedia alone warrant the requested relief. In

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addition, Daniels hereby shows that the subject regulations raise substantial issues under the First Amendment to the U.S. Constitution and the Communications Act that independently warrant temporary relief pending their resolution.

The Commission's so-called "benchmarks" for cable television subscriber rates and the alternative thereto (a cost-of-service analysis) simply do not meet fundamental "due process" standards because (1) the failure of the Commission to articulate the criteria for the cost-of-service option deprives cable operators of the opportunity to make a rational decision,[1/] and (2) the alternative (cost of service) is itself unlawful because it conflicts with statutory and constitutional law. See, e.g., 47 U.S.C. § 541(c) providing that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service". Any cost-of-service evaluation is of course the essence of "common carrier or utility" regulation, and the Commission's determination to apply such concepts to "press" and "speech" activity is coercive and facially unlawful. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94, 120 (1973)(distinguishing in

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1/ Cable operators are presented with a Hobson's choice of two alternatives, one of which is reduction to a non-compensatory rate with the other being a journey into the unknown combined with the forewarning that any recourse will be exceedingly limited. See infra at 5-6.

a First Amendment context between regulation of the communications media and a "utility that itself derives no protection from the First Amendment"). Here, of course, the Commission proposes to regulate the cable component of the mass-media press in a fashion identical to that applied to telephone, power and water utilities. Daniels notes that 47 U.S.C. § 543 is consistent with 47 U.S.C. § 541(c), and any compatible reading of those two provisions of the Communications Act, consistent with the First Amendment, precludes traditional carrier or utility-type regulation (i.e., price caps or cost-of-service) on the cable television media.

Second, the regulatory scheme set forth by the Commission unduly and directly impinges on freedoms protected by the First Amendment. There can be no doubt that cable operators and programmers engage in activities protected by the First Amendment. See Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). While it is certain that Daniels' claims implicate First Amendment interests, it admittedly is uncertain what level of First Amendment scrutiny should apply to the subject regulations. See Turner Broadcasting System, Inc. v. F.C.C., 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers). But whatever First Amendment standards may ultimately attach to the cable component of the electronic press, "it bears repeating . . . that

the Government's ability to impose content-based burdens on speech raises the spector that the Government may effectively drive certain ideas and viewpoints from the marketplace." Simon & Schuster v. Members of New York Crime Victims Board, 112 S. Ct. 501, 508 (1991).

Ad hoc regulations that selectively supervise the "business" of the press and which govern the revenues derived from, and the costs of engaging in, the creation, promulgation or distribution of speech necessarily bear directly on content. See City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-760 (1988). The very existence of such control over the press "intimidates parties into censoring their own speech even if the [government's] discretion and power are never actually abused". Id. at 757. Indeed, the fact that a speaker must demonstrate the "reasonableness" of its charges, or "bear the costs of litigation" that may occur in defending its right to speak, gives rise to a scheme unlawfully "chill[ing] speech in direct contravention of the First Amendment's dictates". Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 794 (1988). As was the case with the statute in Riley, courts may not condone "a measure that requires the speaker [as a precondition to speak] to prove 'reasonableness' case by case based upon what is at best a loose inference that the fee might be too high". Id. at 793.

The benchmark/cost-of-service options established by the Commission do just that. First, they apply an arbitrary standard for all cable rates thus creating an official presumption of "reasonableness".[2/] Second, the sole alternative is resort to a standardless forum where (1) the discretion of local officials is officially enshrined by a highly deferential, "rational basis" review, R&O at ¶149, and (2) the operator assumes the risk that its rates then may be reduced below the benchmark.[3/] The message is clear: those cable operators declining to bow to the "presumptively reasonable" benchmark rates and electing to pursue the cost-of-service alternative, are

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2/ Benchmark rates, while certainly convenient for the Government because they facilitate the regulator's function, fall into that same class of "a simple transcendent criterion" flatly rejected by the Riley Court where speech-related activity is subjected to ad hoc regulation. Id. at 790. See also id. at 795 ("If [benchmarks are] not the most efficient means of preventing [the perceived evil], we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency"). If professional solicitors are entitled to protection from economic-based regulations, especially where the targeted evil is "fraud," id., then the cable television press would

placed on notice that their only recourse is to prove that the alleged abusive treatment is without any "rational basis" -- at best a most difficult burden and one that is per se unconstitutional when applied to activities specially protected by the First Amendment. See Riley, 487 U.S. at 792-795. 4/

"only for rationality," id. at 790, as does the Commission, lacks merit. Any ad hoc restriction on speech-related activity is, at a minimum, subject to "exacting First Amendment scrutiny". Id. at 789. Here, the R&O not only makes no reference to obvious constitutional considerations, it establishes a regulatory frame-

and proof are saddled upon the "protected" speaker. The scheme is unconstitutional.

If a fixed-rate tax selectively placed on a component of the press impermissibly offends the First Amendment, Minneapolis Star and Tribune Co., 460 U.S. 575 (1983), then conferring public officials with ad hoc authority (bounded only by a criterion of "reasonableness") to establish the revenues and limit (or certify) the expenditures of cable publishers is, a fortiori, unconstitutional. Regulatory constraints of similar scope and comparable magnitude have never before been applied to any other media of mass communication or speech-related activity, and survived constitutional scrutiny.

The loss of First Amendment freedoms, even briefly, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976)(plurality opinion) ("The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury"). There is a manifest public interest in upholding the principles of the First Amendment.

WHEREFORE, for all of the reasons presented by InterMedia Partners and herein, the effective date of those rate regulations adopted by the subject Report and Order should be stayed pending administrative and judicial resolution of the substantial statutory and constitutional questions raised by said

regulations. Clearly, such regulations must not be enforced prior to the publication of those standards and criteria to be applied in cost-of-service studies.

Respectfully submitted,

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By: 
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June 9, 1993

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, a secretary with the law firm of Cole, Raywid & Braverman, do hereby certify that copies of the foregoing "Motion for Stay" were sent via first-class, postage prepaid, United States mail, this 9th day of June, 1993, to the following:

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Sharon K. Mathis